or arbitrator, and declare and give in writing that the said arbitrator would come to a decision in accordance with *kurrah* and with reference to possession; in respect of such Dih lands as are occupied by dwelling-houses according to *kurrah* and such as are held possession of without reference to *kurrah*; as also in respect of the property claimed in the suit brought in the Court of the Munsiff of Begu Serai."

We have not been able to make out what powers were intended to be conferred upon the arbitrator by this passage.

The agreement, therefore, not clearly defining the powers of the arbitrator, we are of opinion that the award should not be allowed to be enforced under the provisions of ss. 525 and 526 of the Civil Procedure Code. We, therefore, set aside the decree of the lower Court, and direct the application of the respondent to be dismissed. The agreement executed by both parties being vague and indefinite, the appellants are, in our opinion, not entitled to costs in either Court.

H. T. H. *Appeal allowed.*

CRIMINAL MOTION.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

ABRAHAM (PETITIONER) *v.* MAHTABO AND ANOTHER (OPPOSITE-PARTIES).*

1889 *March* 28.

Criminal Procedure Code (Act X of 1882), s. 551—"Unlawful detention for an unlawful purpose—Infant, Custody of.

A Hindu girl, under the age of 14 years, went of her own accord to a Mission House where she was received and allowed to remain. The mother and husband of the girl thereupon applied to the Magistrate, who took proceedings under s. 551 of the Criminal Procedure Code. The Lady Superintendent of the Mission House denied that the girl was legally married, and alleged that she was practically being brought up with the connivance of the mother to a life of prostitution. The Magistrate, after recording evidence, found that the girl was legally married; that the other allegation was not established; and that, although she went to and remained in the Mission House of her own free will, there was, under the

* Criminal Motion No. 25 of 1889, against the order passed by C. C. Quinn, Esq., Magistrate of Patna, dated the 6th of December 1889.

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circumstances, an unlawful detention for an unlawful purpose. He further found that there were no facts established which would disentitle the husband or the mother to the custody of the girl, and passed an order under the section directing the girl to be restored to her mother.

Held, upon the facts as found by the Magistrate, as it was immaterial whether the girl did or did not consent to remain at the Mission House, there was an unlawful detention within the meaning of these words as used in the section, as the girl was kept against the will of those who were lawfully entitled to have charge of her.

Held, also, that s. 551, applying only as it does to women and female children, must not be construed so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian, but that the purpose whether entertained towards a woman or a female child must be in itself unlawful.

Held, consequently, that, in the circumstances of the case, there was no detention for an unlawful purpose, and that the Magistrate had no power to make the order.

Held, further, that, although the Magistrate had no power under the section to make the order he did, it did not follow that the Court should direct the girl to be restored to the custody of the Lady Superintendent, even if it had the power to do so, and that, having regard to the circumstances of the case, there was nothing to justify such an order being passed.

THIS case arose out of an application made by Mahtabo and Radhakissen to the Magistrate of Patna, under s. 551 of the Criminal Procedure Code, for an order that Ellen Abraham, who was the Lady Superintendent of the Patna Zenana Mission, should restore to their charge a girl Luchminia.

Radhakissen claimed to be entitled to the custody of the girl as her husband, and Mahtabo, who was her mother, was quite willing that her daughter should be made over to him; throughout the proceedings the two petitioners were regarded as forming one party. On the application being made to the Magistrate, an order was passed on the 30th October, directing Miss Abraham to produce the girl in Court, and show cause why she should not be made over to her husband or mother, and thereafter cause was shown, both parties heard by the Magistrate, and several witnesses examined before him. On the 6th December, the Magistrate passed an order to the effect that the petitioners were entitled to the charge of the girl, and that, as they were willing that she should be made over to one

or other of them, she should be made over to the charge of the mother Mahtabo, which was accordingly done.

The facts of the case are fully stated in the judgment of the Magistrate, the material portion of which was as follows :—

"The admitted facts of the case are that the girl Luchminia had been living with Radhakissen, either as his wife or his mistress, for several months, and that on the night of the 16th October she left his house in the company of a woman named Sundari, who was the kept mistress of Radhakissen, and went to the Mission House where she is now living.

"There is, in my opinion, nothing to show that the girl was abducted in the sense in which 'abduction' is used in the Penal Code. To constitute such abduction the use of force or deceit is essential, and there is no reason to believe that either force or deceit was used in this instance. I am also of opinion that if the word 'abduction' include 'kidnapping,' there is nothing in this case to justify the inference that the girl was kidnapped. I am satisfied that the girl went to the Mission House of her own free will, and that she remains there of her own free will.

"The only ground on which the provisions of s. 551 can be applied is that the girl is unlawfully detained. If, as is contended by the respondent, the girl has completed the age of 14 years, it is clear that under this section she must be regarded as a 'woman' and not as a 'child,' and the only order that I could pass would be an order to set her at liberty, and at the same time, it is evident from the girl's own statement, that she is already at liberty. If then the girl has completed the age of 14 years, the order cannot take effect and must be discharged, and it is, therefore, necessary to determine whether the girl has reached this age or not. I do not intend to discuss this question at length; I will only state that the mother and uncle of the girl who are good witnesses, if trustworthy, depose that she is between the age of eleven and twelve years; and that the pundit who prepared her horoscope deposes to the same effect, and has produced the horoscope itself, which bears out this statement as regards her age. I should add, however, that there is no independent evidence that the horoscope was prepared

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at the time alleged, and it is possible that it may have been fabricated for the purpose of this case. On the other hand there is the deposition of the girl herself, which, however, I do not consider to be very good evidence in a case of this kind, and I may add that though her statement, if relied on, shows that she must he more than 12 years of age, it does not clearly establish the fact that she has completed her fourteenth year. The only other evidence, if it can be considered evidence at all, is the testimony of Matangini Bose, that the girl's mother stated her age to be fourteen years. Assuming the evidence to be true, it is clear that, under the circumstances described, the mother had an object in exaggerating the girl's age and it might also be fairly inferred that the girl's appearance and demeanour were such as to suggest that she was younger than her mother represented her to be. Considering the whole evidence on this point, I have come to the decision that the girl is a female child under the age of 14 years. The next point is whether she is unlawfully detained for an unlawful purpose. It is argued that there is no detention whatever, because the girl is free to go or stay; but, in my opinion, a child who is kept or allowed to rem ain in any place, against the wish of his or her lawful guardian, is detained, the child having no voice in the matter as regards assent or dissent. The detention, however, must be unlawful and for an unlawful purpose. The term unlawful is not defined, but a similar word '*illegal*' is defined in the Penal Code and includes everything which furnishes ground for a civil action. I have no doubt that the detention of a child, by a person having no legal claim to the charge of such child, if maintained against the wish of the lawful guardian, would furnish ground for a civil action and I am also of opinion that the detention of a female child, under circumstances calculated to induce her to abandon the religion of her parents and family and to enter another community, which would involve her being outcasted, would be detention for an unlawful purpose. The truth or falsehood of the religion is a matter of which the law takes no cognizance and cannot affect the question. There is no doubt that if the girl remain in the respondent's charge, she will be instructed in the Christian religion and will be

encouraged to become a Christian, and I hold that the respondent cannot lawfully detain the girl against the will of her lawful guardian for such a purpose. The next point that has been raised is that Radhakissen is not entitled to the charge of the girl as he is not her lawful husband. It is, I think, fully proved that Radhakissen went through a form of marriage with the girl, which is recognised as a legal form of marriage by members of his caste, and that he subsequently lived with her and treated her as his wife, and it is not proved that the marriage was invalid by reason of the fact that the girl is of a superior caste and was a widow at the time of the marriage. I think that a good deal of time has been unnecessarily taken up in examining so called experts on this point and I have declined to postpone the case in order to have further evidence of this kind produced; as regards the mother, the only ground on which any serious attempt has been made to dispute her right to the charge of her daughter is that she made over the girl to Radhakissen knowing that no lawful marriage had taken place, and that virtually the girl was made over to Radhakissen to live with him as his mistress, and that having acted in this immoral manner she has forfeited the right to have charge of her daugter. Even assuming, for argument's sake, that the marriage was invalid, there are in my opinion no grounds for inferring that the mother knowingly abetted in the celebration of a mock marriage and intentionally surrendered her daughter to a life of immorality.

"I cannot, therefore, hold that Mussammat Mahtabo has forfeited her natural rights.

"I am of opinion that both Radhakissen and Mussammat Mahtabo are entitled to the charge of Mussammat Luchminia, and as their pleader states that they are willing that the girl should be made over to one or other, I direct that she be made over to the charge of Mussammat Mahtabo."

On January 17th, Mr. *M. P. Gasper*, on behalf of Miss Abraham, applied to the High Court (Mitter and Macpherson, JJ.) for a rule calling on the Magistrate to produce the records in the case and to show cause why his proceedings and order should not be set aside and the girl Luchminia be allowed to return to the custody of Miss Abraham, if she were desirous of doing so.

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The application was made on a petition by Miss Abraham, the material portion of which was as follows :—

1st.—That your petitioner is the Superintendent of the Zenana Mission established at Patna and residing at Goolzarbah in that city.

2nd.—On the 16th day of October 1888, a woman named Luchminia, accompained by another woman, Sundari by name, came to the Mission House. Both women had an interview with your petitioner, and having expressed a desire to reside in such Mission House were permitted to take up their residence there.

3rd.—On the 30th day of October 1888, one Mussammat Mahtabo, the mother of the said Luchminia, and one Radhakissen, alleging himself to be the husband of the said Luchminia, put in separate petitions to the District Magistrate of Patna, praying for the restoration of the said Luchminia to them under the provisions of s. 551 of the Code of Criminal Procedure. These petitions, on the face of them, are unverified documents, and, moreover, contain no allegation that the detention complained of was for an unlawful purpose. On the back of the petition, put in by the said Radhakissen, the District Magistrate made an order directing that a summons should issue on your petitioner to produce the said Luchminia before his Court on the 6th day of November 1888.

4th.—On the 6th day of November 1888 your petitioner, in obedience to the order contained in the said summons, appeared in the Court of the District Magistrate, accompanied by the woman Luchminia. On the same day the said Magistrate examined, under solemn affirmation, sundry witnesses, *viz.*, Mussammat Mahtabo, the mother of the said Luchminia, Gurmukh Narain, Radhakissen, the said Luchminia, and the said woman Sundari. After taking the evidence of those witnesses, the Court adjourned the case to the 14th day of November for further evidence.

5th.—On the application made by Mr. Thompson, on behalf of your petitioner, a further adjournment was granted till the 23rd day of November 1888. During the interval which occurred pending this adjournment, and upon the application of the said Gurmukh Narain, the alleged uncle of the said Luchminia, it was arranged that the said Luchminia should, pending final orders to be passed in the case, be made over to the safe custody of Mr.

Sherfuddin, Barrister-at-law, practising in the Patna Courts, and, in accordance with this arrangement, your petitioner, on the 16th day of November 1888, handed over the said Luchminia into the custody of the said Mr. Sherfuddin, and the said Luchminia continued to reside in the house of the said Mr. Sherfuddin for one day. On the 17th day of November 1888, the said Mr. Sherfuddin being unable to continue to take further charge of the girl, the said Luchminia, with the permission of the Magistrate, was handed back to your petitioner, and thenceforward continued under her care till the 6th day of December 1888, when, under the order of the said Magistrate passed on that date, she was forcibly carried off from the precincts of the Court.

6th.—On the 22nd day of November 1888, during the interval between the adjournments of the case at Bankipur, an application was made on behalf of your petitioner to the High Court of Judicature in Calcutta, in its revisional jurisdiction, for a transfer of the case from the file of the said District Magistrate of Patna to the file of the High Court. This application was rejected by this Hon'ble Court on the same date.

7th.—On the 25th day of November 1888, the case coming on for further hearing before the said District Magistrate of Patna, it was ordered, as your petitioner understood, that the same should be adjourned and heard on some day after the 1st day of December 1888.

8th.—On or about the 26th day of November 1888, Mr. Thompson, on behalf of your petitioner, applied for summons for the attendance of three witnesses, Pundit Sukhobasi Tewari, Pundit Behari Singh, and Pundit Protap Narain, to be called for the purpose of supporting the case put forward by your petitioner, and, on the 28th day of November, an order, directing an issue of the said summons, was passed by the Magistrate ordering the attendance of the said witnesses for the 5th day of December.

9th.—On the 28th day of November, your petitioner is informed and believes that the said Magistrate took further evidence on behalf of the complainants, but such evidence was taken in the absence of your petitioner, who was informed by her legal adviser Mr. Thompson, having regard to the order abovementioned, that the case would not be proceeded with on that day.

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10th.—By an order dated the 28th of November 1888, the date of the further hearing of the case was fixed for the 5th day of December 1888.

11th.—On the 5th day of December 1888, a further hearing of the case was held by the same Magistrate, and sundry witnesses on behalf of the complainant in the case were re-called and further examined, as also were Matangini Bose and Pundit Sukhobasi Tewari and Pundit Behari Singh, the two last being two of the three witnesses summoned on behalf of your petitioner.

12th.—On the same day, it appearing that the said Protap Narain, a priest from Benares, already summoned on behalf of your petitioner was not present in Court, a petition was presented to the Court, on your petitioner's behalf, praying that a fresh summons should issue to the said witness, but the Court, by an order made on the back of the said petition, refused to grant a further postponement of the case and rejected the application.

13th.—Your petitioner submits that the said Magistrate in issuing a summons upon your petitioner, under the provisons of s. 551 of the Code of Criminal Procedure, upon the materials as set forth on the 3rd paragraph of this petition, acted illegally and without jurisdiction.

14th.—Your petitioner further submits that the Magistrate was in error in treating the proceeding as contentious, and the procedure adopted by him was not warranted by the words of the section.

15th.—Your petitioner further submits that upon the facts found by the Magistrate, as indicated in his judgment, he was in error in holding that the woman Luchminia was detained by your petitioner, and that such detention, if any, was unlawful or for an unlawful purpose, and that the said Magistrate in so holding acted without jurisdiction and in error of the proceedings contemplated under the provisions of s. 551 of the Code of Criminal Procedure.

16th.—Your petitioner further submits that the said Luchminia was a Hindu woman, a Khetri by caste, and the widow of one Durbari Lall, who died about 14 months before the alleged second marriage with Radhakissen, a man of inferior caste to

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to herself. Upon these facts which appear in the depositions and which have since been accepted by the said Magistrate, your petitioner contended that the so-called second marriage could be no marriage at all, and relied chiefly upon the evidence of her witness the said Pundit Protap Narain, in support of her contention. The Court was in error, and, as your petitioner submits, acted in prejudice of the case she was desirous of setting up, in refusing to adjourn the case for the examination of the said material witness.

17th.—Your petitioner submits that the said Radhakissen had established no right to the custody of the said Luchminia, and that the said Mahtabo had no right, or, if she possessed such right, had forfeited her claims to such custody.

18th.—Your petitioner submits that the said District Magistrate ought to have held that the evidence adduced did not establish the fact that the said Luchminia was under the age of 14 years, or that she had been unlawfully detained by your petitioner, or that she had been so detained for an unlawful purpose.

Mr. *Gasper*, in applying for a rule, pointed out that s. 551 was introduced into the Code for the first time in 1882, though it had previously found a place in the Presidency Magistrate's Act; that it dealt exclusively with women and female children under the age of 14, and that the inference this gave rise to was obvious. It did not deal with general detention, but only with unlawful detention for an unlawful purpose of women and female children; and it was, therefore, obvious that the class of cases to which it was intended to apply was not intended to include a case like the present. He further contended that the first complaint should have been made on oath, which, in the present case, had not been done. And that although the subsequent proceedings might have been on oath, this did not cure the defect. He also contended that the section contemplated a proceeding of a summary character to prevent an impending injury to a woman or female child, and not a long contentious proceeding like the present for the purpose of obtaining the custody of a minor for which other provisions of the law existed.

The Court stopped Mr. Gasper, intimating that the words "unlawful purpose," contained in the section, must probably be

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taken to mean an "immoral purpose," and granted a rule against the Magistrate in the terms asked for.

On the 13th February the rule came on for argument before a Bench of the High Court consisting of Mitter and Trevelyan, JJ.

Mr. *Gasper* and Baboo *Kali Churn Bonnerjee* in support of the rule.

Mr. *Garth*, instructed by the Deputy Legal Remembrancer, for the Magistrate.

Mr. *Gasper*.—Section 551 contemplates that complaint should be made on oath to the District Magistrate, but here there was no such complaint. The Joint Magistrate examined the complainant, but he was not the proper person to do so, and the District Magistrate had no power whatever to delegate his power under the section to a subordinate. The whole proceedings are, therefore, irregular and bad. In the next place, the section contemplates summary action being taken and not the elaborate enquiry, which has been made in this case, when no less than 13 witnesses have been examined. No provision is made in the Code for the examination of any witnesses under this section, and the object of the section is plainly to prevent immediate and irreparable mischief from being done to the persons of females. Then there was no unlawful detention, because the Magistrate has found that the girl was at perfect liberty to rejoin her people if she so desired. Nor was there any "unlawful purpose," for certainly the education of a girl in the principles of Christainty is not unlawful. [Mr. *Gasper* was then stopped by the Court.]

Mr. *Garth*.—The complaint made by the girl's husband and another to the Magistrate was sufficient, and this case comes within the provisions of s. 551. The words of the section are certainly not as clear as they might be, but there can be no doubt that "unlawful detention for an unlawful purpose" must be taken to mean for an illegal purpose.

[MITTER, J.—It seems to me that having regard to the fact that the section only refers to females, "unlawful purpose" must be taken as meaning an "immoral purpose."]

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Mr. *Garth*.—If that was so, the legislature might easily have so enacted; but the word used is unlawful, and that cannot be read as meaning anything else but "illegal." In this case the girl was detained from the lawful guardianship of her husband and mother, in order that her religion might be changed, and that must surely be held to be unlawful detention for an unlawful purpose.

The decision of the Magistrate on this point is correct, and there can be no question as to his *bonâ fides*.

[TREVELYAN, J.—No one has raised any.]

Mr. *Garth*.—If the Court is of opinion that the Magistrate has not taken the right view of the matter, it is not for me to appear to press such view on your Lordships.

[MITTER, J.—The whole question seems to be this: Can the Court say that the detention was an unlawful detention in the first place, and, if it was, was it for an unlawful purpose? The Magistrate appears to think that unlawful detention means detention which furnishes grounds for a civil action, and unlawful purpose as something which would furnish similar grounds; but could a guardian maintain a civil action only upon the ground that his ward was being instructed in the precepts of Christianity without his consent?]

Mr. *Garth*.—A civil action would lie for the custody of a child by its guardian against the person unlawfully detaining it.

During the argument the following cases were cited by Mr. *Garth*: *In the matter of Mahin Bibi* (1) and *Dowlath Bee* v. *Shaik Ali* (2).

[MITTER, J.—The only question we need decide in the case is whether there has been an "unlawful detention for an unlawful purpose" and upon that point we are with you Mr. Gasper.]

It then appeared that the rule had not been issued against or served upon the husband or the mother, but only on the Magistrate, the Court therefore intimated that it could make no order on the former as to the restoration of the girl to Miss Abraham. Mr. *Gasper* accordingly applied for a rule on them, and a rule was issued calling on Radhakissen and Mahtabo to show cause why

(1) 13 B. L. R., 160. (2) 5 Mad. H. C., 473.

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the proceedings should not be set aside, and why an order should not be made to the effect that the circumstances, which existed before the order complained of was made, be restored; or why an order should not be made directing them to produce the girl in the Court of the Magistrate of Patna for the purpose of restoring her to the custody of the petitioner; or why any such other order should not be passed as the facts of the case might warrant or justify. That rule came on to be heard before a Bench consisting of MITTER and MACPHERSON, JJ., on the 20th March.

Mr. *Gasper* and Babu *Kali Churn Bonnerjee* for the petitioner.

Baboo *Umbica Churn Bose* for the opposite party.

Baboo *Umbica Churn Bose* contended that the order of the Magistrate was right, but whether it was so or not, the girl having now gone to her lawful guardians, *viz.*, her husband and mother, the Court could not interfere to deprive them of her custody. There was, moreover, no power given in the Code to compel the production of the girl, and the only course left was for the Court to say that it had no power to remove the girl from her lawful guardians, and that it had no power to grant that portion of the prayer of the petitioner.

Mr. *Gasper*.—There is no order made by a Subordinate Court which this Court, exercising its revisional powers, cannot set aside. The order of the Magistrate under s. 551 being illegal, this Court can set it aside and order the production of the girl. There can be no doubt that when an illegal order has been made this Court has the power, in setting it aside, to restore the *status quo ante* so that the party against whom the order has been made can be in no way injured thereby. *Rodger* v. *The Comptoir D'Escompte de Paris*. (1.)

[MITTER, J.—I have grave doubts whether under the circumstances of this case we can order the mother to produce the girl for the purpose of her being removed from her custody.]

Mr. *Gasper*.—There can be no doubt your Lordships have the power; the only question is, whether you should exercise it. For

(1) L. R., 3 P. C., 465.

that purpose we must look into the circumstances of the case. I am prepared to show from the evidence that the girl was, at the date of the Magistrate's order, in the Patna Zenana Mission House, a house of respectability, where she was cared for, both as far as her comforts and morality were concerned. From there she was taken to Radhakissen with whom her marriage was a sham, and she was being kept for an immoral purpose. The Court having the power, should exercise it and not permit the mere fact of the mother having the custody of the child to prevent that being done.

[MITTER, J.—Under such circumstances proceedings might be taken under s. 100 of the Criminal Procedure Code.]

Mr. *Gasper*.—On the facts it is clear that the mother has taken the child for an immoral purpose, in order to obtain a living by it.

[MITTER, J.—The evidence having been taken by an officer who had no jurisdiction, can we refer to it and take action on it? The matter must first surely be enquired into by a competent Court.]

Mr. *Gasper*.—But the evidence has been recorded, and if the facts are as I represent, this Court, having the power to undo the action of the Magistrate, can also restore the position of affairs to that which existed before the illegal order, and this should be done.

[MITTER, J.—The same object may be attained under s. 100. If the girl was unwilling to remain with her mother, it might be unlawful detention; if she was being detained for an unlawful purpose, and the mother would not be justified in detaining her.]

Mr. *Gasper*.—There might be difficulties in the way of such a course being adopted. All we desire is that, if the girl is being detained for an immoral purpose, the Court should direct that it be open to her to go to a place where she would be protected.

C.A.V.

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The judgment of the High Court (MITTER and MACPHERSON, JJ.) was delivered on the 28th March, and was as follows:—

Section 551 of the Criminal Procedure Code empowers a District Magistrate, upon complaint made on oath of the abduction or unlawful detention of a woman or of a female child under the age of 14 years, for any unlawful purpose, to make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and to compel obedience with such order, using such force as may be necessary.

In pursuance of an order made under that section, the girl Luchminia was taken from the petitioner, who is the Superintendent of the Patna Zenana Mission, and made over to her mother Mahtabo.

The case comes before us in the exercise of our revisional powers on a rule to show cause why that order should not be set aside, and why the girl should not be restored to the charge of the petitioner, or such other order made as the facts of the case may warrant and justify.

The rule was granted mainly on the ground that the order was made without jurisdiction, as the facts found did not disclose "an unlawful detention for an unlawful purpose."

The complainants are Mahtabo, the mother, and Radhakissen, the alleged husband, of the girl. They made separate complaints, but they are really acting together. Their case is that the girl is under 14 years of age; that she was legally married to Radhakissen, with whom she lived; and that she was taken away by the petitioner and others and detained in the Mission House.

The facts are undisputed to this extent that the girl had lived with Radhakissen for a period of 9 or 10 months, and that on the 18th October she left his house and went to the Mission House, where she remained.

It also appears that while she was living with Radhakissen she was visited by and received instruction from the petitioner and a native teacher attached to the Mission.

On the part of the petitioner, it was denied that the girl was under 14 years of age, and that she was legally married to Radhakissen, and it was alleged that she was practically being brought up, with the connivance of the mother, to a life of prostitution.

The Magistrate took evidence and found that the girl was under 14; that she was legally married; and that, although she went to and remained in the Mission House of her own will, there was, under the circumstances, an unlawful detention for an unlawful purpose. He further found that no facts were established which would disentitle the husband or the mother to the charge of the girl. An order for restoration was accordingly made, and, with the consent of Radhakissen, the girl was made over to her mother. There is no reason to suppose that the facts have been wrongly determined by the Magistrate. There is ample evidence to support his conclusions, and the only question which we have to consider in connection with the order is whether, on the facts found, there was an unlawful detention for an unlawful purpose. Obviously the Magistrate is only empowered to act when the detention and the purpose are both unlawful.

Undoubtedly there was an unlawful detention. It was immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her, and this keeping and the refusal to give her up amounted to detention which was unlawful.

The question whether the purpose was unlawful is, however, more difficult to determine. Admittedly the only purpose was that the girl should become a Christian, and the Magistrate, finding that this involved destruction of her caste and severance from her proper home, held that detention for such a purpose against the will of her guardian was a detention for an unlawful purpose. It is not easy to say what is the meaning of the words "unlawful detention for an unlawful purpose" as used in this section, but their effect clearly is to limit the Magistrate's power of interference to particular cases. It might seem at first sight that the detention of a child, against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or guardian disapproved of, and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or guardian of any control in the education or bringing up of the child, would come within the meaning of the words as well as within the mischief which they were intended to provide against.

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But we think it is not so; and that the purpose, whether entertained towards a woman or towards a female child, must be in itself unlawful.

The purpose of forcing a woman to sexual intercourse would certainly be unlawful; the purpose of having sexual intercourse with a girl under 14, even with her consent, would, I take it, be equally unlawful within the meaning of this section, because the girl's consent would be immaterial. But it cannot be said that the purpose of enabling or persuading an adult woman to become a Christian would be in itself unlawful. If it is not unlawful in the case of an adult woman, it could only be unlawful in the case of a child by reason of its being done without the guardian's consent. But we think it is impossible to construe the section so as to make it include purposes which, although not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian.

The section was not enacted for the protection of children only or of children generally. It applies to women and to female children only, and this combination and the exclusion of male children, goes to show not only that some definite purpose, unlawful in itself, was contemplated, but that the purpose had some special reference to the sex of the person against whom it was entertained. This view is supported by the earlier legislation on the subject. The sections of the earlier Acts, corresponding to s. 551 of the Procedure Code, empowered the Magistrate to act when a woman or female child was detained for specified purposes; *viz.*, adultery, concubinage, prostitution, deflowering or disposing of her in marriage. The words "any unlawful purpose" were first substituted in Bengal Act IV of 1866 for the specified purposes mentioned in the previous Acts, and those words have been used in all the subsequent Acts, but the Magistrate's power has always been restricted to the case of women and female children. It may be that the effect of the alteration was to extend the scope of the section and to include some purposes other than those which were before distinctly specified, but it is unnecessary to consider whether this is the case; it is enough to say that the purpose which

is here found to have been entertained is not an unlawful purpose within the meaning of the section.

It follows that the Magistrate had no power to make the order which he did. The question remains whether, in setting it aside, we should undo what was done in giving effect to it and replace the girl in the charge of the person from whom she was taken. We have no hesitation in saying that if the Magistrate had the power which he supposed he had, he in our judgment exercised it very properly on the facts before him. It does not, therefore, follow that, because we now find he had not the power, we should, as a matter of course, restore the state of things which existed when the order was made.

We are in fact asked to take this child from the charge of her mother or husband, in the custody of one or other of whom she is, and either of whom the law regards as her natural and proper guardian, and make her over to a stranger whose detention of the child, against the will of her husband or mother, would be, *primâ facie*, unlawful. It is, we think, very questionable whether we have the power to do this; but, assuming that we have the power, we could only with propriety exercise it if the proper guardian is shown to be in some way disqualified, or if, at the least, the guardian's character is so bad and mode of life so immoral that it would not be proper to leave the child in his or her charge. Nothing of the sort is established. It is not even alleged that the mother has led or is now leading an immoral life. All that is charged is that, by giving her daughter to a man to whom she was not married, she abandoned her and left her to lead a life of prostitution. The truth of this charge depends upon the fact whether there was or was not a marriage. The Magistrate has found, on ample evidence, that there was a marriage, which would be valid if the parties were not incapable of contracting, and that there is no ground for holding that they were incapable. The marriage is said to be illegal because, according to caste custom, widows are not allowed to marry, and because one of the parties is of higher social status than the other. It is only necessary to point out that widow marriages are now legalised, and that, although a marriage may be improper according to caste custom, it is not on that account illegal.

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ABRAHAM v. MAHTABO.

But the whole charge of immorality against the mother falls to the ground when it is found, as the Magistrate has found, that even if there was any legal defect in the marriage, this was unknown to the mother and Radhakissen, both of whom believed that a valid marriage had taken place.

With the religious aspect of the case we have, of course, nothing whatever to do. It matters not whether the case is one of a Hindu child leaving her parents and being received and detained against their will in a Christian institution in order that she may become Christian, or of a Christian child leaving her parents and being received and detained against their will in a Mahomedan institution in order that she may become a Mahomedan.

There are no circumstances which would justify us in ordering that the child should be made over to the petitioner, and the rule must, so far as it relates to this, be discharged.

H. T. H. *Rule made absolute in part.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

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March 18th.

HUKUM CHAND OSWAL (PLAINTIFF) *v.* TAHARUNNESSA BIBI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, 1882, s. 257A—Agreement for, or to give, time for satisfaction of judgment-debt—Agreement without sanction of Court—Illegal contract—Contract Act (IX of 1872), s. 23—Consideration.

The plaintiff obtained a decree against the defendant under which the judgment-debtor was liable to pay the amount by instalments with interest at 4 per cent. Eventually, the defendant failing to pay, the plaintiff accepted a bond executed jointly by the defendant and *T* his father, by which they both became liable for the amount of the decree with interest at 18¾ per cent. In a suit on the bond, it was contended that the bond was void under s. 257A of the Civil Procedure Code, as being an agreement to give time for the satisfaction of the judgment-debt made for no consideration and without the sanction of the Court, and also without such sanction providing

* Appeal from Appellate Decree, No. 2510 of 1887, against the decree of J. R. Hallet, Esq., Judge of Rungpore, dated the 1st of September 1887, affirming the decree of G. Dalton, Esq., Subordinate Judge of Julpaigoorce, dated the 11th of February 1887.